Arlington Hotel Company, Inc. *and* Southern Missouri-Arkansas District Council, International Ladies' Garment Workers' Union, AFL-CIO. Case 26-CA-9437

May 18, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on November 18, 1981, by Southern Missouri-Arkansas District Council, International Ladies' Garment Workers' Union, AFL-CIO, herein called the Union, and duly served on the Arlington Hotel Company, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 26, issued a complaint on December 2, 1981, against Respondent, alleging that Respondent has engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 13, 1981, following a Board election in Case 26-RC-6354,[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about July 16, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 28, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 5, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 10, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits its refusal to bargain in order to test the Board's certification of the Union in a Federal court proceeding. In the Motion for Summary Judgment, counsel for the General Counsel alleges that Respondent seeks to relitigate issues previously considered in the underlying representation case, and, also, that this case presents no factual issues which warrant a hearing.

Our review of the record herein, including the record in Case 26-RC-6354, discloses, *inter alia*, that on March 19, 1981, the Union filed a petition seeking to represent certain employees of Respondent. The petition was amended on March 31, 1981. On April 30, 1981, the Regional Director issued a Decision and Direction of Election in which he determined that the following employees constitute an appropriate unit:

> All full-time and regular part-time employees of the Employer's Hot Springs, Arkansas, hotel, including guest service hostesses, drugstore and newsstand employees, excluding room clerks, auditing clerks, and clerk/typists, conference sales employees, convention sales employees, publicity clerk, managerial employees, confidential employees, watchmen, guards and supervisors as defined in the Act.

Respondent sought review of the decision on May 13, 1981; the request for review was denied on May 27, 1981. Pursuant to a Decision and Direction of Election, an election was held on May 29, 1981. The tally of ballots furnished the parties shows 141 votes cast for, and 126 votes cast against, the Union. There were 19 challenged ballots, a number sufficient to affect the results of the election. On June 5, 1981, Respondent filed timely objections to conduct affecting the election alleging that the Union misrepresented its relationship with the government and inaccurately represented Board procedures. Further, Respondent alleges that the Union misrepresented material facts concerning the recall of strikers, threatened employees, and appealed to racial and ethnic prejudices. It also contends that the Board erred by excluding certain groups of employees from the unit. Following in-

[1] Official notice is taken of the record in the representation proceeding, Case 26-RC-6354, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

vestigation, the Regional Director issued his Supplemental Decision and Certification of Representative in which he overruled Respondent's objections, and sustained challenges to six challenged ballots, rendering the remaining challenged ballots nondeterminative. On July 27, 1981, Respondent filed a request for review of the Supplemental Decision which was denied on October 16, 1981.

On July 16, 1981, and again on November 3, 1981, the Union, by letter, requested that Respondent recognize and bargain collectively with it. By letter dated November 13, 1981, Respondent stated that it refused to recognize or to bargain with the Union.

In its answer to the complaint, and again in its response to the Motion for Summary Judgment, Respondent admits that it refused to bargain collectively with the Union whose certification it disputes. In its defense, Respondent reiterates its contentions that the unit is inappropriate and that the Union behavior which was the subject of its objections violated the laboratory conditions necessary to a fair election.

As these issues were addressed in the underlying representation case, Respondent is attempting to raise issues herein which were previously litigated.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence. We therefore find that Respondent has not raised any issue which is properly litigable in this unfiar labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a corporation with an office and place of business in Hot Springs, Arkansas, is engaged in the operation of a hotel. In the course and conduct of its business operations, Respondent annually derives gross revenues in excess of $500,000, and purchased and received at its Hot Springs, Arkansas, facility, products, goods, and materials valued in excess of $50,000 directly from points outside the State of Arkansas.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Southern Missouri-Arkansas District Council, International Ladies' Garment Workers' Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees of the Employer's Hot Springs, Arkansas, hotel, including guest service hostesses, drugstore and newsstand employees, excluding room clerks, front desk cashiers, PBX operators, reservation clerks, auditing clerks, and clerk/typists, conference sales employees, convention sales employees, publicity clerk, managerial employees, confidential employees, watchmen, guards and supervisors as defined in the Act.

2. The certification

On May 29, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 26, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 13, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 16, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the the above-described unit.

[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Commencing on or about November 13, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.[3]

Accordingly, we find that Respondent has, since November 13, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Arlington Hotel Company, Inc., set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial priod of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

[3] Although the complaint alleges that Respondent has refused to bargain with the Union since July 16, 1981, Respondent had not received the demand for bargaining as of that date, and in its answer it denies refusing to bargain as of that time. However, it admits that it has refused to bargain since November 13, 1981, when it so advised the Union by letter of that date. Accordingly, we find that Respondent has refused to bargain with the Union as of November 13, 1981.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Arlington Hotel Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Southern Missouri-Arkansas District Council, International Ladies' Garment Workers' Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees of the Employer's Hot Springs, Arkansas, hotel, including guest service hostesses, drugstore and newstand employees, excluding room clerks, front desk cashiers, PBX operators, reservation clerks, auditing clerks, and clerk/typists, conference sales employees, convention sales employees, publicity clerk, managerial employees, confidential employees, watchmen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 13, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 13, 1981, and at all times thereafter to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Arlington Hotel Company, Inc., Hot Springs, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Southern Missouri-Arkansas District Council, International Ladies' Garment Workers' Union, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time employees of the Employer's Hot Springs, Arkansas, Hotel, including guest service hostesses, drugstore and newsstand employees, excluding room clerks, front desk clerk cashiers, PBX operators, reservation clerks, auditing clerks, and clerk/typists, conference sales employees, convention sales employees, publicity clerk, managerial employees, confidential employees, watchmen, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Hot Springs, Arkansas, facility copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Southern Missouri-Arkansas District Council, International Ladies' Garment Workers' Union, AFL–CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time employees of the Employer's Hot Springs, Arkansas, hotel, including guest service hostesses, drugstore and newsstand employees, excluding room clerks, front desk cashiers, PBX operators, reservation clerks, auditing clerks, and clerk/typists, conference sales employees, convention sales employees, publicity clerk, managerial employees, confidential employees, watchmen, guards and supervisors as defined in the Act.

ARLINGTON HOTEL COMPANY, INC.